

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In re Application of)	
)	
Great Lakes Broadcast Academy, Inc.)	File No. BPED-19980112MH
)	
For Construction Permit for a new)	Facility ID No. 89695
FM Station at Baldwin, Michigan)	

MEMORANDUM OPINION AND ORDER

Adopted: June 16, 2004

Released: June 21, 2004

By the Commission:

1. The Commission has before it the May 14, 2002, Application for Review filed by Great Lakes Broadcasting Academy, Inc. ("GLBA").¹ GLBA seeks review of the May 1, 2002, decision by the Media Bureau (the "Staff Decision")² dismissing GLBA's November 14, 2002, submission, styled as a "Second Petition for Reconsideration" (the "Second Petition"). For the reasons stated below, we deny the Application for Review.

2. **Background.** On January 12, 1998, GLBA filed an application for a new noncommercial educational ("NCE") FM station to serve Baldwin, Michigan. GLBA's application conflicted with the application of American Family Association ("AFA") for a new NCE station at Hesperia, Michigan.³ On April 19, 2000, the staff issued a decision returning GLBA's application as unacceptable for filing because it was not timely filed by the established cut-off date for the relevant group of conflicting applications.⁴ On May 9, 2000, GLBA filed a petition for reconsideration (the "First Petition"), attaching an amendment purporting to eliminate the contour overlap with AFA's proposal and seeking acceptance of its application *nunc pro tunc*. On November 7, 2000, the staff denied reconsideration, having determined that GLBA's amended proposal did not eliminate the overlap nor, therefore, the conflict with AFA's proposal.⁵ GLBA did not file an Application for Review of that decision. Subsequently, it filed the Second Petition with a further technical amendment (changing antenna height, power, and coordinates), again purporting to eliminate the conflict with AFA's proposal.

¹ GLBA's Application for Review is dated May 10, 2002, but it was received at the Commission on May 14, 2002. See 47 C.F.R. § 1.7.

² Letter to James J. McCluskey, Director, Ref. 1800B3-MFW (MMB May 1, 2002).

³ File No. BPED-19970404ML.

⁴ Letter to James J. McCluskey, Director, Ref. 1800B3 (MMB Apr. 19, 2000) (citing *Kittyhawk Broadcasting Corp.*, 7 FCC Rcd 153 (1967), *recon. denied*, *Cook, Inc.*, 10 FCC Rcd 160 (1967), *appeal dismissed*, *Cook, Inc. v. U.S.*, 394 F.2d 84 (7th Cir. 1968)).

⁵ See Letter to James J. McCluskey, Director, Ref. 1800B3 (MMB Nov. 7, 2000).

3. The Staff Decision dismissed the Second Petition on two procedural grounds without considering the technical merits of the new amendment. First, the staff cited a 1984 *Public Notice* in which the Commission indicated it would reinstate an original application *nunc pro tunc* if a minor curative amendment were filed within 30 days of the application's dismissal, but that "if the same application [were] returned or dismissed a second time, it [would] not be accorded *nunc pro tunc* reconsideration rights."⁶ Second, the staff concluded that, while petitions for reconsideration are permitted pursuant to Section 405 of the Communications Act of 1934, as amended (the "Act"),⁷ and Section 1.106 of the Commission's rules,⁸ "neither [the statutory provision nor the rule] provides for the filing of a second petition for reconsideration should the original petition be denied."⁹

4. On review, GLBA requests a "waiver of 47 U.S.C. 40.5." We presume that GLBA means Section 405 of the Act. GLBA also requests a waiver of Section 1.106 of the Commission's rules. It asserts in its one-page Application for Review that its amended application should be granted because AFA's conflicting application has since been dismissed and GLBA's proposed station would provide "vital local service to the citizens of Baldwin" and its environs.¹⁰

5. **Discussion.** We disagree with GLBA that the staff's dismissal of the Second Petition was erroneous. GLBA does not explain why it seeks the two waiver requests, but GLBA apparently believes that such waivers would pave the way for acceptance of the Second Petition and consideration of the accompanying new amendment to its application. Section 1.106(k)(3) of our rules states that a "petition for reconsideration of an order which has been previously denied on reconsideration may be dismissed by the staff as repetitious."¹¹ Absent extraordinary circumstances, "[i]f the 'tacking' of petitions were permitted, Commission actions might never become final and the rule would become nugatory."¹² Furthermore, the staff properly relied on the 1984 *Public Notice* in dismissing the Second Petition. GLBA neither cites to any supporting precedent nor presents any compelling circumstances to persuade us to allow the Second Petition in this case. Although, as GLBA observes, no full-service radio station is currently licensed to Baldwin, our data show that at least eight full-service stations provide 60 dBμ signal coverage over Baldwin and its environs.¹³

⁶ *Public Notice*, "Commission States Future Policy on Incomplete and Patently Defective AM and FM Construction Permit Applications," FCC 84-366 (Aug. 2, 1984).

⁷ 47 U.S.C. § 405.

⁸ 47 C.F.R. § 1.106.

⁹ Staff Decision at 2 (citing *A.G.P., Inc.*, 11 FCC Rcd 4628, 4629 (1996), citing *Iola Broadcasting Company*, 2 F.C.C.2d 439 (1966) ("*Iola*"), and *Brainerd Broadcasting Company*, 25 R.R. 297 (1963) ("*Brainerd*").

¹⁰ AFA's application was dismissed May 5, 2002, pursuant to its February 12, 2001, request.

¹¹ 47 C.F.R. § 1.106(k)(3).

¹² *Brainerd*, 25 R.R. at 298 (citation omitted). See also *Iola*, 2 F.C.C.2d at 439 (stating "it is not in the interests of orderly procedure to permit repeated petitions for reconsideration") (citing *Brainerd*).

¹³ Based on our review which was limited to FM service to the area, at least the following 8 full-service stations, all in Michigan, provide 60 dBμ signal coverage to Baldwin and vicinity: WCXT(FM), Hart; WDEE-FM, Reed City; WYBR(FM), Big Rapids; WBLV(FM), Twin Lake; WWKR(FM), Pentwater; WOLW(FM), Cadillac; WIAA(FM), Interlochen; and WTCM-FM, Traverse City.

6. Moreover, assuming *arguendo* that the amended application submitted with the Second Petition were found to be non-conflicting and otherwise technically acceptable for filing, a reversal of the Staff Decision and acceptance of the Second Petition would not necessarily lead to the ultimate remedy GLBA seeks – grant of its application. The application, if reinstated *nunc pro tunc* as of the date GLBA’s initial application was filed, would be placed in pending status, subject to the filing of competing applications when the staff opens the first NCE filing window.¹⁴ It is thus immaterial that AFA’s conflicting application has been dismissed.¹⁵ GLBA will have the opportunity to re-apply for a new NCE FM station in Baldwin during the first NCE filing window and, if it so files, will be in the same position that would result from our acceptance of its amended application at this time. In any event, however, based on all the evidence before us, we find GLBA’s requests for waiver of Section 405 of the Act and Section 1.106 of our rules to be without merit, and we affirm that the Second Petition was properly dismissed.

7. Accordingly, IT IS ORDERED that the Application for Review filed May 14, 2002, by Great Lakes Broadcast Academy, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

¹⁴ Under the rules in effect when GLBA filed its application, applications that were found non-conflicting and acceptable for filing were not immediately grantable. Such applications were placed on “cut-off” notices inviting competing applications. The Commission stopped issuing cut-off notices when it adopted new comparative procedures for NCE applicants in April 2000. *See Comparative Standards for Noncommercial Educational Applications*, 15 FCC Rcd 7386, 7437 (2000) (“NCE R&O”), *clarified, Memorandum Opinion and Order*, 16 FCC Rcd 5074, 5086 (2001). The Commission recognized that a number of applications with file dates prior to April 2000 had not yet been placed on cut-off notices, but nonetheless determined that such applications should await the first NCE filing window (replacing cut-off notices) and be compared to any mutually exclusive applications submitted in that filing window. *See NCE R&O*, 15 FCC Rcd at 7437. Due in part to litigation challenging the NCE comparative procedures, *see American Family Association, Inc., et al. v. FCC & USA*, No. 00-1310 (D.C. Cir.), the Commission has not yet opened such an NCE filing window.

¹⁵ In fact, even if GLBA’s amended application submitted on May 9, 2000, had eliminated the conflict with AFA’s proposal at that time, such that the staff could have accepted GLBA’s application *nunc pro tunc* under normal procedures in connection with GLBA’s First Petition, the application would remain pending today, subject to the filing of other competing applications in the first NCE filing window. *See supra* note 14.